84-878

Office - Supreme Court, U.S.
FILED
NOV 30 1984
ALEXANDER L. STEVAS,
CLERK

No. ...-...

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

LOUIS TOM DRAGNA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WEITZMAN & RÉ
HOWARD L. WEITZMAN, P.C.
MONA C. SOO HOO
9911 West Pico Boulevard,
Suite 1000,
Los Angeles, CA 90035,
(213) 277-8366,
Attorneys for Petitioner.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

20 pp

QUESTIONS PRESENTED

1. Does a district court have jurisdiction to reduce the sentence of a defendant pursuant to Rule 35(b), where:

> (a) the sentence is reduced for the explicit purpose of placing the defendant in a halfway house "away from the kinds of people" that the court, after observing the defendant for an extended period of time and after looking into his background, believed the defendant doesn't belong with, and,
>
> (b) the defendant had not yet surrendered to the custody of the Attorney General to commence serving his sentence within the meaning of 18 U.S.C. § 3568?

2. Does the Court of Appeals have the authority to void the District Court's jurisdiction to reduce or modify a defendant's sentence by substituting its own sentence in place of the trial court's?

3. Where the Petitioner has served the entire one year term of the District Court's reduced sentence, or one half of the original two year sentence, do due process and equal protection call for this Court to reinstate the District Court's reduced sentence if certiorari is denied?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinion Below	1
Jurisdiction	1
Statutes and Rules Involved	2
Constitutional Provision Involved	2
Statement of the Case	3
Reasons for Granting the Petition	4
Conclusion	9
Appendix A	A-1
Appendix B	A-3
Appendix C	A-4

TABLE OF AUTHORITIES CITED

Cases

	Page
Heflin v. United States, 358 U.S. 415, 418 n.7 (1959)	5
United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982)	3
United States v. Eddy, 677 F.2d 656 (8th Cir. 1982)	5
U.S. v. Guiterrez, 556 F.2d 1217 (5th Cir. 1977)	5
United States v. Huss, 520 F.2d 598, 602 (2d Cir. 1975)	7
United States v. Kouwenhoven, 602 F.2d 234, 235 (9th Cir. 1979)	6
United States v. Krueger, 454 F.2d 1154, 1155 (9th Cir. 1972)	6
United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973)	6
United States v. Schafer, 726 F.2d 155 (4th Cir. 1984)	8
United States v. Smith, 650 F.2d 206, 208 (9th Cir. 1981)	6
United States v. Sparrow, 673 F.2d 862 (5th Cir. 1982)	6
United States v. Tucker, 404 U.S. 443, 446 (1972)	5
United States v. Ursini, 296 F.Supp. 1152, 1153 (D.C. Conn. 1968)	6
Williams v. People of State of New York, 337 U.S. 241, 247 (1949)	5

Constitution

United States Constitution, Fifth Amendment	2

Rule

Federal Rules of Criminal Procedure, Rule 35(b)	i, 2, 3, 6, 7, 8, 9

Statutes

United States Code, Title 18, Section 1962 (c) and (d)	3
United States Code, Title 18, Section 3568	i, 2, 7
United States Code, Title 18, Section 3577	2, 5
United States Code, Title 28, Section 1254(1)	2

No. . .-. . .

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

LOUIS TOM DRAGNA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Louis Tom Dragna petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals [Appendix A, *infra*] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 29, 1984 [Appendix A] and was amended on July 5, 1984 [Appendix B]. A timely petition for rehearing and suggestion for rehearing en

banc was filed on June 11, 1984. The petition for rehearing and suggestion for rehearing en banc were denied on October 31, 1984. [Appendix C]. The jurisdiction of this Court to entertain a petition for writ of certiorari is conferred by Title 28, U.S.C. Section 1254(1).

STATUTES AND RULES INVOLVED

Rule 35(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

> The court may reduce a sentence . . . within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding a judgment of conviction . . .

18 U.S.C. § 3568 provides in pertinent part that:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of the sentence . . .

18 U.S.C. § 3577 provides that:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V to the United States Constitution provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner, Louis Tom Dragna, was charged and convicted of violating 18 U.S.C. Section 1962(c) and (d). The District Court initially sentenced him to concurrent two year terms on each of the two counts and imposed the maximum fine of $50,000.00. Petitioner remained free on bail pending appeal. The conviction was affirmed by this court in *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982), and on February 22, 1983 certiorari was denied (103 S.Ct. 1195).

Petitioner timely filed an application for reduction of sentence pursuant to rule 35(b) on June 21, 1983. On October 17, 1983, the District Court granted the Rule 35 motion after duly considering the briefs and oral argument of the parties. Petitioner's sentence was modified to include two consecutive six month terms of confinement in a community treatment center, and two years suspended sentence, five years probation, and the $50,000.00 fine retained. Petitioner was ordered to voluntarily surrender, and did surrender, to the designated community treatment center on October 31, 1983.

On November 15, 1983, the government filed its notice of appeal of the District Court's October 17, 1983 order reducing Petitioner's sentence. The United States Court of Appeals for the Ninth Circuit heard oral argument on May 8, 1984.

On May 29, 1984, the Court of Appeals issued an opinion earmarked for publication which vacated the District Court's judgment and remanded the case for reinstatement of the original sentence. The Court of Appeals held that the District Court was without jurisdiction to reduce Dragna's sentence as it did, and ordered the original sentence reinstated. [see Appendix A].

Petitioner timely filed a Petition for Rehearing; Suggestion for Rehearing En Banc on June 11, 1984. After reviewing the Petition for Rehearing, the government conceded, by letter dated June 18, 1984, the fourth argument in the Petition, namely, that both the government and the Court of Appeals were incorrect in explicating the reduced sentence that the District Court imposed. On July 5, 1984, the Court of Appeals issued an order which amended the text of its May 29, 1984 opinion to correctly reflect the reduced sentence. [see Appendix B].

After serving ten and one half months of the two six month terms of the reduced sentence, Petitioner was released on September 17, 1984 with credit for good time served. Petitioner has fulfilled, and continues to fulfill all of the terms and conditions of his reduced sentence as imposed by the trial court. On October 31, 1984, the Court of Appeals denied the petition for rehearing; and rejected the suggestion for rehearing en banc [see Appendix "C"]. On November 7, 1984, Petitioner timely filed an Application to the Ninth Circuit Court of Appeals for a Stay of Mandate Pending Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' unprecedented opinion is based upon its conclusion that the District Court was without jurisdiction to reduce Petitioner Dragna's sentence for the reasons that it did. Appendix "A", p. 2. The Court of Appeals rejected Petitioner's argument of what the record below reflects, premised its holding on its own erroneous interpretation of the factual record below, and relied upon cases which are factually inapposite to the instant case.

Although the Court of Appeals conceded that the length and type of sentence are determinations properly made by a trial court, it held that the District Court's

decision to reduce the sentence to a split sentence-type confinement in a halfway house was an improper assumption of jurisdiction over an executive function. Thus, the Court of Appeals' opinion improperly preempted the District Court's authority to resentence the Petitioner because of his concern regarding the defendant, and in order to keep him away from the types of people the court felt he didn't belong with.

Existing case law of this Court and of the Circuit Courts of Appeal, however, encourages the individualized inquiry made by the trial court below in fashioning appropriate sentences. Thus, clarification by this court is needed to settle the proper parameters of a District Court's jurisdiction in the fundamental area of resentencing.

From an early date, this Court has advanced the philosophy that punishment should fit the individual offender and not merely the offense. *Williams v. People of State of New York*, 337 U.S. 241, 247 (1949). A sentencing court is entitled to consider information from a wide variety of resources, obtained from "an inquiry broad in scope, largely unlimited either as to the kind of information [considered], or the source from which it may come," in reaching its determination of an appropriate sentence under the circumstances of a case. *Id.; United States v. Tucker*, 404 U.S. 443, 446 (1972); see also 18 U.S.C. § 3577.

A motion to reduce sentence pursuant to Rule 35(b) is part of the original criminal proceeding in which the offender was convicted and originally sentenced. *Heflin v. United States*, 358 U.S. 415, 418 n.7 (1959); *U.S. v. Guiterrez*, 556 F.2d 1217 (5th Cir. 1977). Thus, the exercise of informed discretion afforded a trial court in its initial sentencing decision likewise extends to the

resentencing inquiry. *United States v. Eddy*, 677 F.2d 656 (8th Cir. 1982).

The Rule 35 motion affords the sentencing judge an even greater exercise of discretion, however, since the function of the motion is to allow the judge to decide upon reflection that an original lawful sentence was unduly harsh. *United States v. Smith*, 650 F.2d 206, 208 (9th Cir. 1981); *United States v. Maynard*, 485 F.2d 247, 248 (9th Cir. 1973). The motion is in the nature of a "plea for leniency" directed to the court's discretion. *United States v. Krueger*, 454 F.2d 1154, 1155 (9th Cir. 1972).

A court reconsidering a sentence may decide the motion without holding a hearing or receiving testimony, *United States v. Maynard, supra; United States v. Krueger, supra;* and is not required to explain or justify its reasons for reducing or refusing to reduce a sentence. *United States v. Ursini*, 296 F.Supp. 1152, 1153 (D.C. Conn. 1968). A motion to reduce sentence will not be disturbed on appeal absent a clear abuse of discretion. *United States v. Sparrow*, 673 F.2d 862 (5th Cir. 1982); *United States v. Kouwenhoven*, 602 F.2d 234, 235 (9th Cir. 1979); *United States v. Krueger, supra* at 1155.

The position taken by the Ninth Circuit in the opinion below is unsupported by a single case to implicitly or explicitly hold that a trial court may not, on a Rule 35 motion, consider the nature of confinement, including a consideration of the types of inmates which an offender should or should not be housed with, or the security level of the place of confinement. Further, the cases relied upon by the Court of Appeals below in support of its finding that the District Court lacked jurisdiction to reduce sentence are not controlling, since the motions were in the nature of petitions for writs of habeas corpus where the petitioners had already surrendered to the

custody of the Attorney General and commenced serving sentence [see Appendix A].

In this case, unlike the cases cited by the Court of Appeals, the District Court had not yet required Petitioner Dragna to voluntarily surrender to the custody of the Attorney General, but allowed him to remain free on bail during the pendency of the Rule 35 proceedings. Jurisdiction over an offender begins at the time the offender is received in the custody of the agents of the Attorney General. *United States v. Huss*, 520 F.2d 598, 602 (2d Cir. 1975); 18 U.S.C. § 3568. Since the Bureau of Prisons did not have actual jurisdiction over Petitioner Dragna at the time of resentencing, the cases relied upon by the government and by the Court of Appeals are inapposite here and should not be used to encroach upon a District Court's resentencing discretion.

This careless grant of authority to the Attorney General via the Bureau of Prisons is an unwarranted erosion of the resentencing court's virtually limitless discretion as set forth in earlier pronouncements of this Court and by the legislature. Moreover, ratifying the Court of Appeals' opinion has the effect of vesting authority in the Bureau of Prisons over the type of sentence to be imposed *before an offender has been ordered by the trial court to surrender* to the custody of the Attorney General. Finally, the opinion is unsound for policy reasons, since it will foster judicial unaccountability by encouraging resentencing judges to decide Rule 35 motions without holding a hearing, allowing argument, or giving reasons for their ultimate rulings on the motions. The need for clarification by this Court is clear, since the opinion below will alter the administration of resentencing in the federal criminal justice system.

2. By reinstating the original sentence, the Court of Appeals denied Petitioner Dragna his absolute right to

timely present a motion for reduction of sentence to the District Court. Rule 35(b) of the Federal Rules of Criminal Procedure guarantees every lawfully sentenced offender a statutory right to move for a reduction of sentence within 120 days after entry of final judgment of conviction.

The Court of Appeals appears to follow the course taken in *United States v. Schafer*, 726 F.2d 155 (4th Cir. 1984), a case which is inappropriately relied upon by the Court of Appeals below (see discussion in Section 1, *supra*). The opinion completely removes the District Court's authority to reconsider Petitioner Dragna's Rule 35 motion and instead substitutes an appellate court's judgment, based on its review of the trial court's record below, that the original sentence should not be modified.

Due process and equal protection require that if the District court's judgment is to be vacated, the cause should be remanded to the District Court for reconsideration of the merits of Petitioner Dragna's Rule 35 motion subject to the sentencing constraints established by this Court. The Court of Appeals' decision to reinstate the original sentence was based on inappropriate considerations and denies Petitioner Dragna important fundamental rights. Thus, review by this Court, or, in the alternative, remand to the trial court is essential to maintain the consistent administration of the Federal Rules of Criminal Procedure.

3. As the statement of facts indicates, Petitioner Dragna was released from confinement on September 17, 1984, with credit for good time served, after completing ten and one half months of the twelve month term of the reduced sentence. His early release coupled with the fact that he remains under the government's supervision pursuant to the terms and conditions of his probation argue

well for the wisdom and validity of the District Court's reduction of sentence.

Although a reduction of sentence should not normally be made by a reviewing court, but is left to the sentencing court on remand[1], it is respectfully urged that this Court exercise its supervisory power over the administration of justice in the lower federal courts and reinstate the District Court's reduced sentence in the interest of justice. Alternatively, the equities of the underlying case call for this court to entertain a petition for writ of certiorari, or to remand to the trial court for further proceedings on the merits of Petitioner's Rule 35 motion.

CONCLUSION

The petition for writ of certiorari should be granted; or, in the alternative, this Court should either remand to the trial court for further proceedings on the Rule 35 motion, or reinstate the District Court's reduced sentence.

Dated: November 30, 1984.

Respectfully submitted,

WEITZMAN & RÉ
HOWARD L. WEITZMAN,
MONA C. SOO HOO,
Attorneys for Petitioner.

---

[1] *Yates v. United States*, 356 U.S. 363, 366-367 (1958).

APPENDIX A

FILED MAY 29, 1984 PHILLIP B. WINBERRY, Clerk, U.S. Court of Appeals in the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT No. 83-5275 DC No. CR 79-126(A)-TJH. UNITED STATES OF AMERICA, Appellant, vs. LOUIS TOM DRAGNA, Appellee. Appeal from the United States District Court for the Central District of California Terry J. Hatter, District Judge, Presiding. Argued and submitted May 8, 1984 *OPINION.*

Before: GOODWIN, SNEED and ALARCON, Circuit Judges PER CURIAM

Dragna was convicted in a jury trial of racketeering activities in violation of 18 U.S.C. § 1962(c) and (d) and sentenced to two concurrent two-year terms on each count and fined $50,000. This court affirmed the conviction. *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982).

After the Supreme Court denied certiorari, 102 S.Ct. 1195 (1983), the defendant filed a motion for reduction of sentence under Fed. R. Crim. P. 35(b). The district court reduced the sentence to six months in a community treatment center and two years suspended sentence, retaining the fine.

Review of the transcript from the sentence reduction hearings indicates that the district judge attempted to use his power under Rule 35 to assure that the defendant would not be placed in a custodial facility selected by the Bureau of Prisons in keeping with its internal regulation concerning persons convicted of RICO offences. By attempting to assert authority over the location of confinement, the district court exceeded its jurisdiction under the resentencing statute. While a judge has wide discretion in determining the length and type of sentence, *United States v. Warren*, 610 F.2d 680, 684 (9th Cir.

1980), the court has no jurisdiction to select the place where the sentence will be served. Authority to determine place of confinement resides in the executive branch of government, 18 U.S.C. § 4082(a), and is delegated to the Bureau of Prisons. Because the district court was without jurisdiction to reduce Dragna's sentence as it did, reinstatement of the original sentence is appropriate. *United States v. Schafer*, 726 F.2d 155 (4th Cir. 1984).

The district court's judgment is vacated and the case is remanded for reinstatement of the district court's original sentence.

0813A/0020A

APPENDIX B

Filed July 5, 1984. Phillip B. Winberry, Clerk, U.S. Court of Appeals, in the United States Court of Appeals for the Ninth Circuit No. 83-5275. United States of America, Appellant, v. Louis Tom Dragna, Appellee ORDER.

Before: GOODWIN, SNEED and ALARCON

The opinion entered herein on May 29, 1984, is amended as follows:

On page 2348 of the slip opinion, second column, second paragraph in text of the opinion, fifth line into paragraph, (page 1, line 20, of typed opinion), delete "six months" and insert "two consecutive six month confinements".

The last sentence of the second paragraph of the opinion will then read: "The district court reduced the sentence to two consecutive six month confinements in a community treatment center and two years suspended sentence, retaining the fine."

APPENDIX C

Filed October 31, 1984 Phillip B. Winberry, Clerk, U.S. Court of Appeals in the United States Court of Appeals for the Ninth Circuit No. 83-5275. United States of America Appellant, v. Louis Tom Dragna, Appellee ORDER.

Before: GOODWIN, SNEED and ALARCON, Circuit Judges

The panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Office-Supreme Court, U.S.
FILED
JAN 4 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-878

In the Supreme Court of the United States

OCTOBER TERM, 1984

LOUIS TOM DRAGNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a district judge may reduce a sentence pursuant to Fed. R. Crim. P. 35(b), almost four months after the time limit had expired for actions under that Rule, solely because of his disagreement with officials of the Executive Branch as to the defendant's place of confinement.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statute and federal rule of criminal procedure involved	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Ange v. *Paderick*, 521 F.2d 1066	7
Bugg v. *United States*, 140 F.2d 848, cert. denied, 323 U.S. 673	7
Neal v. *Jackson*, 692 F.2d 783	7
Sotto v. *Wainwright*, 601 F.2d 184, cert. denied, 445 U.S. 950	9
United States v. *Addonizio*, 442 U.S. 178	8
United States v. *Brooklier*, 685 F.2d 1208	2
United States v. *Huss*, 520 F.2d 598	7
United States v. *Kajevic*, 711 F.2d 767, cert. denied, No. 83-5536 (Jan. 9, 1984)	6, 8, 9, 10, 11
United States v. *Krohn*, 700 F.2d 1033	6, 9
United States v. *Mendoza*, 581 F.2d 89	8
United States v. *Pollack*, 655 F.2d 243	9
United States v. *Sackinger*, 704 F.2d 29	7
United States v. *Schafer*, 726 F.2d 155, cert. denied, No. 83-1663 (Nov. 28, 1984)	6, 8, 9, 10
United States v. *Smith*, 650 F.2d 206	9
United States v. *Warren*, 610 F.2d 680	6

Statutes, regulation and rules:

18 U.S.C. 1962(c)	2
18 U.S.C. 1962(d)	2
18 U.S.C. 4082(a)	1, 6, 7
28 U.S.C. 2255	8

Statutes, regulation and rules—Continued: Page

28 C.F.R. 0.96(c) 7
Fed. R. Crim. P.:
Rule 35 ..... 4, 6, 8, 9, 10
Rule 35(b) 2, 3, 5, 6, 8, 10
Rule 45(b) 8, 10

Miscellaneous:

Federal Prison System, U.S. Dep't of Justice, Federal Prison System Program Statement No. 5100.2, *Security Designation and Custody Classification System* (Oct. 7, 1982) 7

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-878

LOUIS TOM DRAGNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 746 F.2d 457.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1984. A petition for rehearing was denied on October 31, 1984 (Pet. App. A4). The petition for a writ of certiorari was filed on November 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

18 U.S.C. 4082(a) provides:

> A person convicted of an offense against the United States shall be committed, for such term

of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

Fed. R. Crim. P. 35(b) provides:

> The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

STATEMENT

On November 14, 1980, following a seven week jury trial, petitioner was convicted in the United States District Court for the Central District of California of racketeering and conspiracy to commit racketeering activities, in violation of 18 U.S.C. 1962 (c) and (d). The district court (Hatter, J.) sentenced him to concurrent two year terms on each count and to fines totaling $50,000. The court of appeals affirmed the convictions (*United States* v. *Brooklier*, 685 F.2d 1208), and this Court denied a petition for a writ of certiorari on February 22, 1983 (459 U.S. 1206).

As recounted in the court of appeals' initial decision (685 F.2d at 1213, 1220), the evidence at trial showed that petitioner, the chief of the Los Angeles family of La Cosa Nostra, and four co-defendants engaged in a scheme to extort money from pornog-

raphers and bookmakers in the Los Angeles area. Petitioner approved of plans to shake down two individuals and employed "Jimmy The Weasel" Fratianno as his agent to extort money from the "Forex" corporation, an FBI-operated undercover pornography business. In addition, petitioner planned the murder of a colleague, Frank Bompensiero, upon learning that he was an informant.

At petitioner's sentencing on January 20, 1981, Judge Hatter imposed concurrent two year terms, recommending that they be served at a "Level 1" minimum security facility. See 7/25/83 Tr. 12; E.R. 40.[1] On the basis of its security designation and custody classification guidelines, however, the Bureau of Prisons determined that petitioner should be confined, at least for the first year, in a medium security facility. On June 21, 1983—119 days after his certiorari petition was denied—petitioner filed a motion for reduction of sentence under Fed. R. Crim. P. 35(b). The motion was premised upon the Bureau of Prisons' designation of a medium security confinement in Seagoville, Texas, a location distant from petitioner's family and business. E.R. 22-27a.[2]

At a hearing on the motion, on July 25, 1983, Judge Hatter stated (7/25/83 Tr. 12-13; E.R. 40-41):

---

[1] "E.R." is the abbreviation for the Excerpt of Record in the court of appeals.

[2] The motion also stated (E.R. 27) that although petitioner "has been linked with 'Organized Crime' it is clear * * * that the community receives no service or benefit from Mr. Dragna being locked away." The motion suggested that the court consider imposing "additional community services" as an alternative to imprisonment "to allow the community to further benefit from this man's generosity and past community participation" (*ibid.*).

> I am concerned, however, because my recommendation, strong recommendation, is that [petitioner] Dragna, having met the qualifications for level one, be placed in a level one institution. And if it turns out that the Bureau of Prisons isn't prepared to do that, then I will modify the sentence and we won't have anybody to put anywhere, if they want to play that kind of game. I just think it's unfair.

Judge Hatter then repeated his recommendation that petitioner "be placed in the level of institution for which he is qualified, and that is level one, and that he be placed as close to California as possible * * *" (E.R. 43). Accordingly, he stayed petitioner's prison reporting date "until further order of the Court and the Court is informed of the designation of the place of service" (Order of July 27, 1983; E.R. 44a).

Thereafter, the Bureau of Prisons confirmed its earlier decision to incarcerate petitioner at a medium security institution rather than at a Level 1 facility as recommended by the district court (10/17/83 Tr. 3; E.R. 44b, 63). During a hearing on October 17, 1983, Judge Hatter reiterated his dismay at the Bureau for not following his recommendation and expressly asserted that for that reason alone he would reduce the two year sentence he had previously imposed (10/17/83 Tr. 11-12; E.R. 71-72):

> [T]he only change that I would make now is that I was mistaken in thinking that the Bureau of Prisons would agree to house this particular individual away from the kinds of people that I have indicated before that he didn't belong with.

Accordingly, on October 19, 1983—four months after petitioner had filed his Rule 35 motion and four

months after the deadline imposed by the Rule for action upon such motions—the court suspended the two-year sentence, and imposed five years' probation on condition that petitioner serve two consecutive six-month terms in a Community Treatment Center. It left intact the $50,000 fine.[3]

The government appealed the district court's reduction of sentence, and the court of appeals reversed (Pet. App. A1-A2). While recognizing that a district court has wide discretion under Fed. R. Crim. P. 35(b) to modify a sentence, the court held that the district court had improperly exercised this authority by using it to review and control the Bureau of Prisons' designation of the place of confinement, a decision that is wholly entrusted to the Executive Branch. It therefore vacated the district court's order and remanded the case for reinstatement of the district court's original sentence.[4]

ARGUMENT

1. Petitioner contends (Pet. 4-7) that the decision of the court below, which precludes a district court from reducing a sentence solely because of its disagreement with the place of confinement designated by the Bureau of Prisons, improperly limits the district court's "broad discretion" to reduce sentence un-

---

[3] We understand that petitioner has now completed this sentence and has been released from confinement at a southern California halfway house.

[4] On October 31, 1984, the court of appeals denied a petition for rehearing (Pet. App. A4), and on November 21, 1984 it denied a motion for a stay of mandate. On December 3, 1984, Justice Rehnquist denied petitioner's application for recall of the court of appeals' mandate and stay of the court's order reinstating the sentence.

der Fed. R. Crim. P. 35(b). This claim is without merit and does not warrant further review.

We do not challenge the proposition that, as a general rule, a district court acting in timely fashion has "almost unlimited discretion under Rule 35 to reduce federal sentences upon a timely motion." *United States* v. *Warren*, 610 F.2d 680, 684 (9th Cir. 1980). But it is well established that a district court's authority under Fed. R. Crim. P. 35(b) cannot be employed so as to encroach upon determinations concerning the execution of a sentence entrusted by Congress to the Executive Branch. See, *e.g.*, *United States* v. *Schafer*, 726 F.2d 155, 157-158 (4th Cir. 1984), cert. denied, No. 83-1663 (Nov. 11, 1984) (Fed. R. Crim. P. 35(b) cannot be "misused as a substitute for the consideration of parole by the Parole Board"); *United States* v. *Kajevic*, 711 F.2d 767 (7th Cir. 1983), cert. denied, No. 83-5536 (Jan. 9, 1984) (same); *United States* v. *Krohn*, 700 F.2d 1033, 1039 (5th Cir. 1983) (the "final inquiry" is whether the district court's disposition of a Rule 35 motion "deliberately or effectively intervened in matters committed to the authority of the Parole Commission"); *United States* v. *Warren*, 610 F.2d at 683-684 (the district court may not use power under Rule 35(b) to usurp the authority of the Executive Branch to determine priority of custody between state and federal governments).

Authority to determine the place of confinement has been entrusted to the Attorney General, not to the district courts. See 18 U.S.C. 4082(a) ("[a] person convicted of an offense against the United States shall be committed * * * to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be

served"). The Attorney General, in turn, has delegated this authority to the Bureau of Prisons. 28 C.F.R. 0.96(c).[5] In accordance with that authority, the Bureau has issued detailed guidelines for determining the place of confinement appropriate for a particular offender. The guidelines take into account, inter alia, the nature of the offense, the defendant's criminal record, and any recommendation made by the sentencing court. See Federal Prison System, U.S. Dep't of Justice, Federal Prison System Program Statement No. 5100.2, *Security Designation and Custody Classification System* (Oct. 7, 1982). As the court explained in *United States* v. *Huss*, 520 F.2d 598, 602 (2d Cir. 1975), this "statutory scheme * * * permits a trial judge no * * * power [to control the place and conditions of confinement]. * * * The limit of the court's custodial sentencing power is to commit the defendant 'to the custody of the Attorney General.'" See also *United States* v. *Sackinger*, 704 F.2d 29, 30 (2d Cir. 1983); *Neal* v. *Jackson*, 692 F.2d 783, 786 n.6 (D.C. Cir. 1982); *Ange* v. *Paderick*, 521 F.2d 1066, 1068 (4th Cir. 1975); *Bugg* v. *United States*, 140 F.2d 848, 852 (8th Cir.), cert. denied, 323 U.S. 673 (1944).

---

[5] Petitioner maintains (Pet. 7) that the Bureau of Prisons exceeded whatever authority it might otherwise possess to fix his place of confinement because he had not yet surrendered to the Attorney General and the Bureau therefore "did not have actual jurisdiction over [him] at the time of resentencing." However, 18 U.S.C. 4082(a) does not require the Attorney General to have physical custody of the defendant as a prerequisite to designating the place of confinement. Rather, it permits the Attorney General to make such a designation upon the district court's commitment of a prisoner to his custody. The judgment and commitment order issued by the district court at the time of sentencing, by its express terms, committed petitioner to the custody of the Attorney General.

Therefore, as the court of appeals concluded (Pet. App. A1), "[b]y attempting to assert authority over the location of confinement, the district court exceeded its jurisdiction under the resentencing statute." The district court's action in reducing petitioner's sentence solely because of disagreement concerning the Bureau of Prisons' selection of the place of confinement was as much an abuse of its authority under Fed. R. Crim. P. 35(b) as is a use of authority under Rule 35(b) or 28 U.S.C. 2255 to control the discretion of the Parole Commission. See *United States* v. *Addonizio*, 442 U.S. 178, 188-190 (1979); *United States* v. *Schafer*, 726 F.2d at 157-158; *United States* v. *Kajevic*, 711 F.2d at 771-772.

2. Under Fed. R. Crim. P. 35(b), "[t]he court may reduce a sentence * * * within 120 days after entry of any order or judgment of the Supreme Court denying review of * * * a judgment of conviction." This period is jurisdictional and may not be extended. *United States* v. *Addonizio*, 442 U.S. at 189; see Fed. R. Crim. P. 45(b). Here, as noted above, petitioner's motion to reduce sentence was not filed until 119 days after denial of his petition for a writ of certiorari, and the motion was not granted until four months after the 120-day period had expired. Whatever the rule might be with respect to the factors that may be considered by the district court when it acts within the 120-day time limit provided by Rule 35, it is clear that the court's untimely action here was erroneous.

Several courts of appeals have interpreted Rule 35 (b) to permit the district court a "reasonable time" after the expiration of the 120-day period to act on a motion to reduce sentence, provided the motion was made within the period. *United States* v. *Mendoza*, 581 F.2d 89, 90 (5th Cir. 1978) (en banc); see

United States v. *Smith*, 650 F.2d 206, 209 (9th Cir. 1981); but see *United States* v. *Kajevic*, 711 F.2d at 771 (dictum); *United States* v. *Pollack*, 655 F.2d 243, 245 (D.C. Cir. 1980). All courts of appeals that have considered the question, however, have agreed that this nonliteral interpretation cannot be stretched to permit the district court to assume authority to review decisions regarding parole or place of confinement entrusted to the Executive Branch. *E.g.*, *United States* v. *Schafer*, 726 F.2d at 157-158; *United States* v. *Kajevic*, 711 F.2d at 771-772; *United States* v. *Krohn*, 700 F.2d at 1039. Indeed, one of the basic purposes of the time limitation on the power to reduce sentence is to guarantee that "trial courts will not inadvertently usurp the power of the [Executive Branch] by making delayed rulings on motions to mitigate." *Sotto* v. *Wainwright*, 601 F.2d 184, 192 (5th Cir. 1979), cert. denied, 445 U.S. 950 (1980).

The record in this case leaves no room for doubt that the district court's action under Rule 35 was precisely and only for the purpose of countermanding the Bureau of Prisons' designation of petitioner's place of confinement. The district judge stated on July 25, 1983, that if the Bureau of Prisons "isn't prepared to do that [follow the court's recommendations]" then "I will modify the sentence and we won't have anybody to put anywhere, if they want to play that kind of game" (7/25/83 Tr. 13; E.R. 41). The court then stayed petitioner's prison reporting date and held in abeyance a final ruling on the motion expressly to await a report by the Bureau as to its final designation of a place of confinement (E.R. 44a). On October 17, 1983, when the court granted petitioner's motion for reduction of sentence, the judge stated (10/17/83 Tr. 11-12; E.R. 71-72) that the

"only change" he would make in his original sentencing determination was that he was "mistaken in thinking that the Bureau of Prisons would agree to house this individual" in accordance with his recommendation. To delay action on a Rule 35 motion for four months after the jurisdictional deadline for the express purpose of overseeing the executive's performance of its discretionary responsibilities is not a "reasonable" delay by any standard.

On this ground, the instant case is indistinguishable from the decisions in *Schafer* and *Kajevic*, in each of which this Court has recently denied a petition for certiorari raising a similar issue.[6] There is no reason why this case is any more worthy of review.

c. Petitioner also argues (Pet. 7-8) that, even if the court below were correct in its holding that the district court exceeded its authority under Fed. R. Crim. P. 45(b), it should not have ordered reinstatement of the original sentence but should have remanded the case to the district court for further action on the motion. However, by delaying disposition of the motion for almost four months past the deadline solely to see what action would be taken by the Bureau of Prisons, the district court lost its jurisdiction to reduce petitioner's sentence. See Fed. R. Crim. P. 35(b); *United States* v. *Schafer*, 726 F.2d

---

[6] Petitioner attempts (Pet. 6) to distinguish *Schafer* on the ground that it involved a motion to reduce sentence in the nature of a petition for a writ of habeas corpus. This contention is incorrect. In *Schafer*, the defendant's motion to reduce sentence was expressly based upon Fed. R. Crim. P. 35(b), and the court's decision was limited to addressing the propriety of the district court's action under that rule. 726 F.2d at 157.

at 156; *United States* v. *Kajevic*, 711 F.2d at 771-772. If the district court lacked jurisdiction to modify the sentence, the appropriate disposition was to reinstate the original sentence.

Even assuming the district court still possessed jurisdiction to act on the motion, however, a remand would have been fruitless. It plainly appears from the district judge's remarks during the October 17, 1983, hearing that the *only* reason why he deemed reduction of the sentence appropriate was his disagreement with the place designated for applicant's confinement (E.R. 71-72; see pages 9-10, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

JANUARY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10137